

SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

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Submitted: May 28, 2009
Decided: September 24, 2009

RE: *Christina Villari and Michael Villari v. Richard J.
Mulshenock, III, C.A. No.: 07C-03-017 FSS*

**Upon Plaintiffs' Motion for a New Trial or Additur – GRANTED, in part.
Upon Defendant's Motion for Costs – GRANTED, in part.**

Dear Counsel:

These motions stem from a “zero verdict.” After an April 12, 2005, rear-end collision, Plaintiff, Christina Villari, was “black and blue” and stiff. At trial, liability was not contested, but after testimony from several witnesses, including two medical experts from each side, the jury awarded no damages. Because of the “zero

verdict,” Plaintiffs seek a new trial or additur. Meanwhile, Defendant seeks costs based on Plaintiffs’ having rejected two offers of judgment.

Following the collision, Plaintiff had several complaints: bruising, spasms, dizziness and vomiting, and lower back pain. Before the collision, however, Plaintiff suffered from a preexisting back injury.

At trial, Plaintiffs presented Drs. Carabelli and Palmer. Dr. Palmer, who saw Plaintiff one day after the collision, testified that Plaintiff suffered from “severe spasms.” Dr. Carabelli, who examined Plaintiff two weeks after the collision, testified that, notwithstanding Plaintiff’s preexisting injuries, the collision caused: neck and back injuries, a closed-head injury, radiculopathy, and bruising.

Defendant also presented two medical experts, Drs. Bonner and Brooks. Dr. Bonner testified that Plaintiff’s alleged post-collision neck and back injuries were the result of the preexisting, degenerative condition. Dr. Bonner further testified that “if [Plaintiff] has sustained an accident in April of 2005,” her injuries “would have been soft tissue in nature[.]” Additionally, Dr. Bonner conceded that Plaintiff’s family doctor’s records, dated two days after the collision, noted an objective finding of bruising.

Based on Dr. Bonner's concession, Plaintiffs seek a new trial. Plaintiffs argue that it was uncontroverted that Christina Villari was "black and blue" and stiff following the collision. The court agrees.

The case presented to the jury featured Plaintiff's serious back problems, not stiffness and bruising. The jury probably refused to attribute the back problems to Defendant, and it then ignored the other problems as *de minimus*. It is clear, however, that there was an objective finding of bruising and spasm following the collision. Even Defendant's expert, Dr. Bonner, testified that these objective findings have a medical backing. Accordingly, while the verdict is easily explained, it cannot stand under *Amalfitano v. Baker*.¹

Delaware courts have frequently granted additur in personal injury cases. *Reid v. Hindt*² recently upheld additur. In *Reid*, as here, plaintiff was not awarded damages by the jury in a personal injury action. When plaintiff moved for a new trial and opposed additur, this court, *sua sponte*, awarded plaintiff \$2,500 in additur, and defendant was given the opportunity to consent to the award instead of a new trial. *Reid* quotes *Rudnick v. Jacobs*:³

¹794 A.2d 575 (Del. 2001).

²976 A.2d 125 (Del. 2009).

³197 A. 381 (Del. 1938).

We can see no reason why parties should be put to the expense and annoyance of a new trial when the only purpose of such trial could be to have a jury make a calculation which a former one should have made and which the court is equally competent to make.⁴

When determining an appropriate additur amount, “the defendant must be given every reasonable factual inference and the Court must determine what the record justifies as an absolute minimum.”⁵ Therefore, Plaintiff, Christina Villari, is entitled to \$3,500, and Plaintiff, Michael Villari, is entitled to \$350.

Furthermore, as mentioned, Defendant moved for costs under Superior Court Civil Rule 68. On October 11, 2007, Defendant filed a \$12,001.00 Offer of Judgment, and, on April 8, 2009, Defendant filed a Second Offer of Judgment for \$14,501.00 for Plaintiff Christina Villari and \$501.00 for Plaintiff Michael Villari. Plaintiffs rejected both offers. Under Rule 68, “[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.” Thus, because Plaintiffs received a “zero verdict,” and assuming Defendant accepts additur, Plaintiffs are required to pay Defendant’s post-offer costs.

⁴*Id.* at 384.

⁵*Murphy v. Thomas*, 2002 WL 1316242, at *1 (Del. Supr. June 13, 2002).

Defendant further requests that Plaintiffs pay \$6,395.00 in costs. Defendant's post-offer expenses included: \$3,000.00 for Dr. Bonner's video trial deposition; \$395.00 for video services by Corbett Reporting; and \$3,000.00 for Dr. Brooks's trial testimony.

While an award of costs under Rule 68 is required, the Rule provides no guidance as to what recoverable costs are.⁶ Generally, "the award of costs for expert witness testimony is committed to the sound discretion of the trial court."⁷ When analyzing medical experts' testimonial fees, this court has previously held that "the Court must 'recognize that a significant disruption to a physician's practice occurs when a physician is called to testify as an expert witness and that such testimony is important to the Court since it assists the trier of fact and serves a significant public interest.'"⁸ The court has often relied upon a 1995 study by the Medical Society of Delaware's Medico-Legal Committee when calculating medical experts' testimonial fees.⁹

⁶*Casarotto v. U.S. Auto. Ass'n*, 2006 WL 336746, at *1 (Del. Super. Jan. 17, 2006).

⁷*Dunkle v. Prettyman*, 2002 WL 833375, at *3 (Del. Super. May 1, 2002) (citing *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 723 (Del. 1976)); 10 *Del. C.* § 8906.

⁸*Casarotto*, 2006 WL 336746, at *1.

⁹*See, e.g., Campbell v. Whorl*, 2008 WL 4817078, at *7 (Del. Super. Oct. 30, 2008), *aff'd*, 2009 WL 321643 (Del. Supr. Feb. 10, 2009).

Plaintiffs claim that the fees requested by Defendant are excessive and that the court should reduce them. Plaintiffs rely on *Payne v. Home Depot*,¹⁰ and *Campbell v. Whorl*.¹¹ In *Payne*, plaintiff requested \$3,750 for his medical expert's testimony, including \$3,000 for his trial testimony. *Payne* held that this was excessive, as the testimony took less than a half-day. Thus, the court adjusted the amount to \$2,700, "which is very near the upper range of reasonable medical expert witness fees for a half-day time period."¹² Furthermore, in *Campbell*, reasonable half-day testimony fees for October 2008 were calculated to be \$1,935.70 to \$2,680.20.¹³

Defendant requests \$3,000 for Dr. Bonner's video trial deposition, which lasted approximately one hour. Further, Defendant requests \$2,500 for Dr. Brooks's trial testimony, which lasted between approximately forty-five minutes to an hour, and \$500 for Dr. Brooks's review of depositions. Based on the Medico-Legal Committee report adjusted for January 2009, the range of reasonable half-day testimony fees was \$1,953.90 to \$2,705.40.¹⁴ Considering the relatively short time

¹⁰2009 WL 659073 (Del. Super. March 12, 2009).

¹¹2008 WL 4817078 (Del. Super. Oct. 30, 2008).

¹²*Payne*, 2009 WL 659073, at *7.

¹³*Campbell*, 2008 WL 4817078, at *7.

¹⁴*Payne*, 2009 WL 659073, at *7. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Archived News Releases for Consumer Price Index*, available at http://www.bls.gov/schedule/archives/cpi_nr.htm (last visited Sept. 23, 2009).

that Defendant's medical experts spent testifying, the court will reduce Defendant's post-offer costs to \$2,000, apiece, for both experts, plus the \$395 videographer's fee.

For the foregoing reasons, Plaintiffs' Motion for a New Trial is **DENIED**, provided Defendant accepts additur, as provided above, within 30 days of this order's date. If Defendant accepts additur, Defendant's Motion for Costs is **GRANTED**, in part, as provided above.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

cc: Prothonotary (Civil)